

3

Supreme Court, U.S.
FILED
NOV - 9 1993
OFFICE OF THE CLERK

No. 93-527

In the Supreme Court of the United States
OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE
MONROE-WOODBURY CENTRAL SCHOOL DISTRICT,

Petitioner,

-against-

LOUIS GRUMET and ALBERT W. HAWK,

Respondents.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS.
FOR THE STATE OF NEW YORK

REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Lawrence W. Reich
Counsel of Record

John H. Gross

Neil M. Block

INGERMAN, SMITH, GREENBERG,
GROSS, RICHMOND, HEIDELBERGER,
REICH & SCRICCA

Counsel for Petitioner

167 Main Street

Northport, New York 11768

(516) 261-8834



TABLE OF CONTENTS

Page

Table of Authorities.....	ii
Reply to Brief in Opposition to Petition for Writ of Certiorari.....	1
Irrelevant Issues Raised in the Brief in Opposition	6
A. Other Cases Involving Satmarer	6
B. Applicability of the I.D.E.A.	7
C. Duty to Create Heterogeneous School Districts.....	8
Necessity to Revisit the <i>Lemon</i> Test.....	9
Conclusion.....	10

TABLE OF AUTHORITIES

Page

Cases Cited:

<i>Board of Education of the Monroe-Woodbury C.S.D. v. Wieder</i> , 72 N.Y.2d 174, 531 N.Y.S.2d 889 (1988)	1, 4, 5, 6
<i>Bollenbach v. Board of Education of the Monroe-Woodbury Central School District</i> , 659 F.Supp. 1450 (S.D.N.Y. 1987).....	6
<i>Bowen v. Kendrick</i> , 487 U.S. 589 (1988).....	4
<i>Brown v. Board of Education</i> , 347 U.S. 483 (1955).....	8
<i>Clayton v. Place</i> , 884 F.2d 376 (8th Cir. 1989) cert. den. 494 U.S. 1081, 110 S.Ct. 1811, 108 L.Ed.2d 942 (1990)	5
<i>County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, et al.</i> , 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).....	1
<i>Lee v. Weissman</i> , 505 U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).....	2, 3, 4, 9
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	7, 9, 10
<i>Parents' Association of P.S. 16 v. Quinones</i> , 803 F.2d 1235 (2nd Cir. 1986).....	7
<i>U.S. v. Scotland Neck City Board of Education</i> , 407 U.S. 484 (1972).....	9
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	5

TABLE OF AUTHORITIES

	Page
<i>Wolman v. Walter</i> , 433 U.S. 229 (1977).....	5
<i>Wright v. Council of the City of Emporia</i> , 407 U.S. 451 (1972).....	9
<i>Zobrest v. Catalina Foothills School District</i> , ___ U.S. ___, 113 S.Ct. 2462 (1993)	9
Constitutional Provisions:	
United States Constitution, First Amendment	1, 5
Statutes and Regulations:	
Chapter 748 of the Laws of 1989.....	1, 4, 8
Individuals with Disabilities Education Act (Title 20 U.S.C. § 1400, <i>et seq.</i>)	6, 7, 8
Other Authorities:	
<u>Neutchterlein, Note, The Free Exercise Bound- aries of Permissible Accommodation Under The Establishment Clause</u> , 99 Yale L.J. 1127 (1990)	2

THIS PAGE
INTENTIONALLY
LEFT BLANK

The Petition for a Writ of Certiorari presents issues of significant public importance and of a recurring nature which warrant the granting of the writ. Although the Brief in Opposition suggests that the facts of this case are so unique that review by this Court will have limited future applicability, this is clearly not true. What is before the Court in the within appeal is the constitutionality of permissive legislative accommodation in that "zone of accommodation" which lies between what is permissible under the Establishment Clause of the First Amendment to the Federal Constitution and what is compelled by the First Amendment's Free Exercise Clause.

It is settled law that the "scope of accommodation permissible under the Establishment Clause is larger than the scope of accommodation mandated by the Free Exercise Clause" (*County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, et al.*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 [1989]). No party contends that enactment of Chapter 748 of the Laws of 1989 was *compelled* by the Free Exercise Clause. Indeed, New York's Court of Appeals in *Board of Education of the Monroe-Woodbury C.S.D. v. Wieder*, 72 N.Y.2d 174, 531 N.Y.S.2d 889 (1988) had previously rejected a contention by the Satmarer that they had a right to insist that special education services be provided separately to their children, just as that Court similarly rejected the Board's argument that it could furnish such services only within the context of public school placements but not separately. Characterizing that litigation as "a litigation of 'musts'" (*id.*, at p.178), the Court noted:

It may well be that certain of the services in controversy could be furnished to defendants at neutral sites if plaintiff determined to do so

(See, *Wolman v. Walter*, 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714, *supra*). This declaratory judgment action poses only the abstract question whether services *must* be furnished in public schools (as plaintiff insists) or *must* be furnished separately (as defendant insists); the actual services involved are not even fully specified. We therefore have no occasion to—nor could we—determine where any particular services could be rendered in conformity with constitutional principles." (at Footnote 3, p.189) (emphasis in original)

In Neutchterlein, Note, The Free Exercise Boundaries of Permissible Accommodation Under The Establishment Clause, 99 Yale L.J. 1127 (1990), the author comments that courts must distinguish between those laws which take religion into account and those which were enacted *for the purpose of advancing religion*. He suggests that a law accommodating religious belief is not the same as one which purposefully advances it. Illustrative of the former are laws authorizing sacramental use of wine during Prohibition, laws authorizing sacramental use of peyote by certain Native American Indians and laws authorizing a "moment-of-silence". In such cases, state legislatures have acknowledged a religious belief but have not purposefully advanced it. He characterizes this phenomenon, the accommodation of religious beliefs of others as a respectful thing to do rather than for the purpose of advancing such beliefs, as a form of "secular respect". He notes that "[a]ccommodating these people simply reflects the government's secular respect for their right to choose their way of life".

Similarly, Justice Souter's concurring opinion in *Lee v. Weissman*, 505 U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467

(1992), also speaks to the necessity for accommodation. He notes:

That government must remain neutral in matters of religion does not foreclose it from ever taking religion into account. The State may "accommodate" the free exercise of religion by relieving people from generally applicable rules that interfere with their religious callings. See, e.g., *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); see also *Sherbert v. Verner*, 374 U.S. 398 (1963). Contrary to the views of some, [FN7] such accommodation does not necessarily signify an official endorsement of religious observance over disbelief.

In everyday life, we routinely accommodate religious beliefs that we do not share. A Christian inviting an Orthodox Jew to lunch might take pains to choose a kosher restaurant; an atheist in a hurry might yield the right of way to an Amish man steering a horse-drawn carriage. In so acting, we express respect for, but not endorsement of, the fundamental values of others. We act without expressing a position on the theological merit of those values or of religious belief in general, and no one perceives us to have taken such a position.

The government may act likewise. Most religions encourage devotional practices that are at once crucial to the lives of believers and idiosyncratic in the eyes of nonadherents. By definition, secular rules of general application are drawn from the non-adherent's vantage

and, consequently, fail to take such practices into account. Yet when enforcement of such rules cuts across religious sensibilities, as it often does, it puts those affected to the choice of taking sides between God and government. In such circumstances, accommodating religion reveals nothing beyond a recognition that general rules can unnecessarily offend the religious conscience when they offend the conscience of secular society not at all. (at 112 S.Ct. 2649, 2676-77)

Chapter 748 of the Laws of 1989 accommodates a purely secular interest of the Satmarer by facilitating access by their disabled children to bilingual, bicultural special education programs and services. It should be noted that the decision of the Court of Appeals in *Wieder, supra*, which served, at least in part, as the catalyst for the legislation, acknowledged the argument of the Satmarer that "they should be exempted from public school placements only for *nonreligious* reasons—most particularly because of the emotional impact on the children of traveling out of Kiryas Joel" (*id.* at p.189 [emphasis in original]). Similarly, the legislative findings which prompted enactment of the Chapter also stressed the secular nature of the accommodation to be effectuated by the statute by conditioning provision of secular special educational programs and services within the context of a public school placement by public employees at a public site. If the accommodation also meets the religious preferences of the Satmarer, this is not a basis for invalidating it. As this Court noted in *Bowen v. Kendrick*, 487 U.S. 589 (1988):

"We see no reason to conclude that [the statute at issue] serves an impermissible religious purpose simply because some of the goals of the

statute coincide with the beliefs of certain religious organizations".

In *Clayton v. Place*, 884 F.2d 376 (8th Cir. 1989) cert. den. 494 U.S. 1081, 110 S.Ct. 1811, 108 L.Ed.2d 942 (1990), the Court of Appeals for the Eighth Circuit specifically held that the mere fact that a governmental body took an action which coincided with the principles or desires of a particular religious group did not "transform the action into an impermissible establishment of religion" (*id.* at p.380). To the contrary, invalidation of an otherwise valid secular act merely because it coincides with the religious objectives of a particular religious group would constitute overt hostility to religious precepts rather than neutrality and would thus violate the "Free Exercise Clause".

This Court's decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), illustrates the principle that a state may relieve a party of a burden upon its free exercise rights absent a compelling state interest to the contrary. Since this Court has held in the "neutral site" cases (*Wolman v. Walter*, 433 U.S. 229 [1977] and its progeny) that a public board of education may separately serve students sharing a common religious heritage at a public site without violating the Establishment Clause, it follows that the New York State Legislature was not constitutionally precluded from establishing a *de facto* public neutral instructional site for the disabled students of Kiryas Joel by enacting a statute which facilitated access to programs and services in a manner which addressed the Satmarer's legitimate secular concerns. In fact, the Court of Appeals of the State of New York in *Board of Education of Monroe-Woodbury C.S.D. v. Weider*, 72 N.Y.2d 174, 189, had directly alluded to the possibility that the Board might itself establish the "neutral site" and serve the Satmarer disabled students separately from other public school students.

IRRELEVANT ISSUES RAISED IN THE BRIEF IN OPPOSITION

Respondents have floated a veritable school of red herrings in opposition to the Petition. Amongst them are the effect to be afforded to various judicial precedents involving other Satmarer on unrelated issues, the applicability of the Individuals with Disabilities Education Act, and the existence of an alleged obligation to create large, heterogeneous public school districts. These issues are irrelevant and should not be considered.

A. Other Cases Involving Satmarer

Respondents would have this Court adopt a new evidentiary standard by giving collateral estoppel or issue preclusion effect to findings of fact and conclusions of law in a variety of unrelated cases also involving Satmarer Hasidim. This is manifestly inappropriate.

In *Board of Education of the Monroe-Woodbury C.S.D. v. Weider*, 72 N.Y. 174 (1988), the issue before the New York State Court of Appeals was not what was permissible but rather what was required. Thus, the case is inapplicable except to the extent which it supports a legislative history of the Chapter which recognized a perceived secular need for special education services based upon the existence of such non-religious factors as fear of travel outside the community into a broader world in which the Satmarer students were recognized as being "different" by virtue of their customs, practices and distinctive manner of dress.

Bollenbach v. Board of Education of the Monroe-Woodbury C.S.D., 659 F.Supp. 1450 (S.D.N.Y. 1987), involved the employment rights of more-senior male bus drivers who drove bus transportation routes involving

Satmarer Hasidic students. However, since male and female students are educated together in the public school classes of the Kiryas Joel Village School District and since the District employs staff without regard to race, color, creed, national origin or sex, it is difficult to perceive the relevance of *Bollenbach*.

Parents' Association of P.S. 16 v. Quinones, 803 F.2d 1235 (2nd Cir. 1986), involves a Hasidic community located in Brooklyn, New York and an entirely unrelated set of facts. None of the parties hereto were parties to *Quinones*, *supra*, and consequently the findings of fact made therein are not binding upon petitioner. In *Quinones*, *supra*, the New York City Public School District had closed off nine classrooms in a public school building for the exclusive use of Hasidic female students, employed only Yiddish-speaking female teachers and utilized the teaching methodology preferred by the Satmarer. Upon these facts, it was understandable that the Court found an impermissible endorsement of governmental support for the separatist tenets of the Satmarer, in violation of the second prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This should be sharply contrasted with the legislation at issue, which vests responsibility for provision of programs and services in a public body which, in actual practice, conducts the activities of the District in a secular manner which in many respects is antithetical to the basic principles of Satmarer Hasidism.

B. Applicability of the I.D.E.A.

The Individuals with Disabilities Education Act (Title 20 U.S.C. § 1400 *et seq.*), hereinafter I.D.E.A., creates an elaborate statutory procedure to assure provision of free and appropriate programs and services to disabled students in the least restrictive educational environment.

Respondents suggest in their Brief in Opposition that the statute should be stricken because there is no evidence in the Record below to suggest that the disabled students within the Village are "incapable of benefiting from regular classroom programs with use of supplementary aids and services" (Brief in Opposition; p.15) That, however, was not the issue in the Courts below. The sole issue before the New York State Court of Appeals was whether the challenged statute was constitutional on its face. No claim was raised in the Complaint that the statute was unconstitutional as applied. The secondary statutory issue of the compatibility of Chapter 748 of the Laws of 1989 with the provisions of the I.D.E.A. was not relevant before the Courts below and is equally irrelevant herein.

C. Duty to Create Homogeneous School Districts

Respondents have not identified any obligation arising under the Federal Constitution which requires states to create large, heterogeneous public school districts. Education is perhaps the most important of the functions reserved by the United States Constitution to the respective states. If a state legislature chooses to create a public school district from amongst the territory of another, there is no federal constitutional requirement that the resulting school district be heterogeneous in its student composition. Indeed, there could be no such constitutional obligation where, by reason of geography or freedom of association a great majority of inhabitants of a particular geographic area share a common racial, ethnic or religious identification. Furthermore, those cases in which this Court has refused to allow local officials to carve out new school districts from amongst the property of existing districts have each involved school districts in the process of dismantling dual school systems pursuant to the direction of this Court in *Brown v. Board of Education*, 347

U.S. 483 (1955). Cf. *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972); *U.S. v. Scotland Neck City Board of Education*, 407 U.S. 484 (1972). Thus, they are not relevant hereto.

NECESSITY TO REVISIT THE LEMON TEST

It is extremely difficult for governmental entities whose conduct is constrained by limitations inherent in the Establishment Clause to assess the validity of their proposed actions within the context of the *Lemon* test. Similarly, once action is taken, subordinate courts have openly questioned whether *Lemon*, or, more particularly, whether the various components of the three-pronged test, are still applicable as the theoretical framework for assessing the constitutionality of governmental action against the core principles inherent in the Establishment Clause. This Court's failure to cite and apply *Lemon* in its recent opinions in *Lee v. Weissman*, 505 U.S. ___, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) and in *Zobrest v. Catalina Foothills School District*, ___ U.S. ___, 113 S.Ct. 2462 (1993), lends credence to the suggestion that a majority of the Justices of the Court may wish to revisit *Lemon* and to consider its continued viability.

Petitioner acknowledges the difficulty of identifying core principles including coercive and non-coercive activities which fall short of establishing a state religion. However, the current test, if indeed *Lemon* is still viable, provides a variable and inconsistent vehicle for assessing the constitutionality of governmental action, because ephemeral perceptions, e.g. the label which the "objective observer" places upon a set of facts often defines the legitimacy of the enterprise.

This case provides an appropriate vehicle for revisiting the *Lemon* test. This Court should take such opportunity and grant the Petition for a Writ of Certiorari.

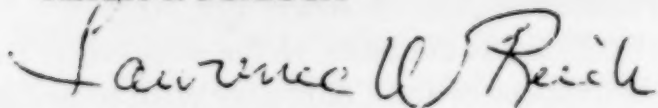
CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals of the State of New York should be granted.

Dated: Northport, New York
November 4, 1993

Respectfully submitted,

INGERMAN, SMITH, GREENBERG,
GROSS, RICHMOND, HEIDELBERGER,
REICH & SCRICCA

A handwritten signature in cursive script, reading "Lawrence W. Reich".

By: Lawrence W. Reich
Counsel of Record

John H. Gross
Neil M. Block
Counsel for Petitioner
167 Main Street
Northport, New York 11768
(516) 261-8834

